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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:

The Complaint of EVERETT A. SISSON, as owner
of the motor yacht the ULTORIAN, for exoneration
from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND
INSURANCE COMPANY, and PORT AUTHORITY
OF MICHIGAN CITY, et al., Claimants,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.
2. Whether a federal court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is unconnected to traditional maritime activity.

LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, as owner of the motor yacht the *ULTORIAN* and the respondents Burton B. Ruby, Fireman's Fund Insurance Company, Port Authority of Michigan City, Joseph T. Charles, Cincinnati Insurance Company, Continental Insurance Company, John P. Walter and Roger Dillon as claimants in the limitation proceeding.

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No. 88-2041

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The Respondents, BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY and PORT AUTHORITY OF MICHIGAN CITY, respectfully request that this Court refuse to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding.

STATEMENT OF THE CASE

The Petitioner's statement of the case omits to state that Petitioner's yacht was a pleasure craft, docked at the Washington Park Marina, which harbored other pleasure boats. The fire which erupted on the Petitioner's pleasure yacht caused damage to the dock and several other pleasure yachts. Neither commercial vessels nor commercial shipping were affected by the occurrence.

Petitioner sought injunctive and declaratory relief in the district court, seeking to limit his liability to the claimants to \$800.00, the alleged value of his yacht after the fire.

The district court dismissed Petitioner's complaint for lack of admiralty jurisdiction. Petitioner moved for reconsideration, alleging that the Limitation of Liability Act, 46 U.S.C. §181, *et seq.* provides a separate source of admiralty jurisdiction. The district court denied the motion because Petitioner introduced a new legal theory not raised in the original opposition to dismissal. The court then reviewed Petitioner's theory and rejected it, concluding that the Limitation of Liability Act does not provide an independent basis of admiralty jurisdiction, and, even if it did, Petitioner is not entitled to limit his liability for damage caused by a pleasure boat.

Petitioner never raised in the district court or in the Seventh Circuit the argument that the Extension of Admiralty Act, 46 U.S.C. §740, *et seq.*, provides an independent source of admiralty jurisdiction.

REASONS FOR DENYING THE WRIT

Pursuant to Rule 17 of the Rules of Practice of the Supreme Court of the United States, a review on writ of certiorari is not a matter of right, but of judicial discretion, to be granted only when there are special and important reasons therefore, such as when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeal on the same matter or when a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of the United States Supreme Court. This Court should, in its discretion, refuse to issue a writ of certiorari because this case involves a narrow set of facts regarding which the district court and federal appellate court issued rulings consistent with the published decisions of other federal courts of appeal and consistent with the decisions of this United States Supreme Court.

I.

This Case Presents Narrowly Drawn Facts Which Do Not Warrant Supreme Court Review.

This case presents the unique and unusual question of whether a fire aboard a non-commercial vessel docked at a recreational marina, allegedly caused by a defective washer-dryer unit, bears a significant relationship to traditional maritime activity. The Seventh Circuit applied the plain language of this Court's rulings in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) in deciding that these facts do not lend themselves to admiralty jurisdiction.

The Seventh Circuit recognized that its ruling was limited to the narrow fact pattern presented in this case. It recognized that if the Petitioner's vessel had been in a shipping channel when the fire broke out, blocking commercial shipping or if the vessel had a commercial aspect, the result reached may have been different. *Decision* at page 12a, n.5. However, since this fire had absolutely no commercial import and since the occurrence had nothing to do with navigation, the Seventh Circuit applied admiralty law to these facts and concluded, as did the district court, that these facts do not warrant federal admiralty jurisdiction. Since the decision of the Seventh Circuit is limited to the unique facts of this case, it does not warrant Supreme Court review.

II.

The Decision Of The Seventh Circuit Is Consistent With Decisions Of This Supreme Court.

The Seventh Circuit based its decision upon the plain and unambiguous language of this Court's opinions in *Executive Jet* and *Foremost*. In *Executive Jet*, this Court held that admiralty jurisdiction may be invoked in tort cases only where the plaintiff shows "a significant relationship to traditional maritime activity". *Id.* at 268. This Court described traditional maritime activity as "involving navigation and commerce on navigable waters." *Id.* at 272. In *Foremost*, this Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce". *Id.* at 674-75. Although this Court refused to require that alleged tortfeasors be engaged in commercial activity before they could assert admiralty jurisdiction, this Court cautioned that "[n]ot every accident in navigable waters that might disrupt

maritime commerce will support federal admiralty jurisdiction." *Id.* at 675 n. 5. Accordingly, federal admiralty jurisdiction is limited to certain torts involving maritime commerce which have a significant relationship to traditional maritime activity.

Interpreting the plain language of the *Foremost* decision, the Seventh Circuit concluded:

The references to 'traditional maritime activity' in *Foremost* always rely upon discussion of 'navigation' or the 'operation of a vessel' to explain the concept. *Id.* at 674-76 (emphasis supplied). In a key passage, *Foremost* holds that in that case the collision between two pleasure boats on navigable waters fell under admiralty jurisdiction because of '[t]he potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty holds for navigation.' *Id.* at 675 (emphasis supplied). Thus there is a reasonable basis for concluding that the *Foremost* Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation.

Decision at 7a-8a.

Similarly, the Seventh Circuit relied upon references in *Executive Jet*, in which this Court described traditional maritime activity as "navigation or commerce on navigable waters" 409 U.S. at 256, quoted in *Decision* at 11a, to limit admiralty jurisdiction in non-commercial contexts to torts involving navigation. The Seventh Circuit also relied upon an earlier Supreme Court case, in which this Court noted that if it were to require a cause of action in tort to be of a maritime nature, it would look to "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters." *Atlantic Transport Co. v. Imbrokev*, 234 U.S. 52, 62 (1914) (quoted in *Executive*

Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 258 (1972)), Decision at 11a, n.4. Based upon these Supreme Court rulings, the Seventh Circuit ruled that a non-commercial vessel, involved in a fire which does not affect navigation or commercial shipping, lacks the requisite nexus to traditional maritime activity to permit federal jurisdiction.

The Seventh Circuit also referred to the federal interest in protecting commerce and guaranteeing a uniform body of laws to promote and govern maritime commerce. Petitioner demands federal jurisdiction so he can limit his common law tort liability by taking advantage of an admiralty law intended to promote American commercial shipping. The Seventh Circuit recognized the inequity of such a result. The Seventh Circuit wrote: "First and most important, if this sort of fire were to join navigation as a 'traditional concern' of maritime law, it would be nearly impossible to establish any limiting principle with respect to what satisfies the nexus requirement." Decision at 12a-13a. Therefore, based upon this Supreme Court's guiding language, the Seventh Circuit barred from admiralty jurisdiction a non-commercial vessel which caught fire and damaged other non-commercial vessels and a non-commercial dock and which had no impact at all upon commercial shipping. Clearly, the Seventh Circuit's ruling is consistent with, and actually follows, the rulings of this Supreme Court regarding the limited federal jurisdiction over non-commercial torts on navigable waters. This decision does not warrant further review.

III.

The Decision Of The Seventh Circuit Is Consistent With Decisions Of Other Federal Courts Of Appeal.

Petitioner erroneously alleges that the decision of the Seventh Circuit is in sharp contrast with the law in other circuits. Nothing could be further from the truth. The decision of the Seventh Circuit in this case is consistent with the decisions of other federal circuits, all of which rely upon the factors enunciated by this Court in *Executive Jet* and *Foremost* to evaluate the propriety of federal admiralty jurisdiction in each case.

The cases cited by Petitioner illustrate the consistent approach. In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the court recognized that the facts and circumstances of each claim must evidence a substantial connection with maritime activities in order to invoke federal admiralty jurisdiction. The *Kelly* court enunciated several factors which illustrate traditional maritime activities but rested its decision on the fact that "[t]he party most seriously injured was the pilot, the person responsible for the safe navigation of the river". *Kelly* at 525-26. In *American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), the court focused upon whether the boats in question were withdrawn from navigation, and ruled that "in determining whether a vessel has been withdrawn from navigation, one must look at its pattern of use". *American Eastern* at 125. Although the Seventh Circuit, in a footnote, declined to adopt the "four factor" test used by several other circuits, Decision at 8a, n.2, the factors applied by the Seventh Circuit involve analysis of the same issues: whether the parties, instrumentalities, injuries and circumstances bear a significant relationship to traditional maritime activity.

The Seventh Circuit restricted its decision to the narrow fact pattern presented in this case, and recognized that a fire aboard a pleasure craft could, in a different case where the fire has an impact upon commerce or navigation, warrant admiralty jurisdiction. By doing so, the Seventh Circuit avoided the broad application which the Petitioner ascribes to the Seventh Circuit. The decision of the Seventh Circuit is consistent with the decisions of other circuits because it is restricted to the facts presented.

IV.

The Limitation Of Liability Act Does Not Provide An Independent Basis For Admiralty Jurisdiction When The Underlying Tort Fails To Qualify As Maritime.

The District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals both rejected Petitioner's claim that the Limitation of Liability Act, 49 U.S.C. §189, *et seq.*, provides an independent basis of federal jurisdiction even though the underlying tort is not maritime. Petitioner relies upon *Richardson v. Harmon*, 222 U.S. 96 (1911) as his sole support. The Seventh Circuit rejected Petitioner's argument, explaining that *Richardson* was decided before the enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, *et seq.*, which eliminated the need and reason for the rule established by the *Richardson* case. More importantly, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing admiralty jurisdiction. The Limitation of Liability Act was intended to support competitive commercial activity by American seagoing vessels. No similar purpose is served by extending jurisdiction to non-maritime torts. Instead, Petitioner is seeking to circumvent

normal tort rules of liability by claiming admiralty jurisdiction over a non-maritime tort. There is no sound judicial basis for doing so and no reason for this Court to review this matter.

V.

The Question Of Whether The Extension Of Admiralty Act Provides An Independent Basis For Admiralty Jurisdiction Was Not Preserved For Appeal.

Petitioner did not argue, plead or allege in the district court or in the appellate court that the Extension of Admiralty Act provides an independent basis for federal jurisdiction. Therefore, this issue was not preserved for appeal. Although this Court may consider jurisdiction at any time, this Court should, in exercising its discretion, refuse to consider this argument.

Alternatively, there is no sound basis in law or policy to allow federal admiralty jurisdiction under this Act where no federal jurisdiction would otherwise exist. This Act merely extends admiralty jurisdiction when the injury occurs on land and corrects an inequity created by the "locality" test, which has since been rejected. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 268 (1972). This Act was not enacted to extend federal jurisdiction where the underlying tort does not qualify as maritime. This argument does not warrant Supreme Court review.

CONCLUSION

Respondents respectfully request that this Court refuse to issue a writ of certiorari.

Respectfully submitted,

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